

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

In the matter of:

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT
COUNCIL 16, Charging Party

vs.

DELTA SANDBLASTING COMPANY, INC.,
Respondent

Cases: 20-CA-176434
32-CA-180490

RESPONDENT DELTA SANDBLASTING COMPANY, INC.'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE MARA-LOUISE ANZALONE

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Respondent Delta Sandblasting Company, Inc. ("Respondent," "Company" or "Delta") hereby takes exception to the September 15, 2017 decision of Administrative Law Judge Maralouise Anzalone ("ALJ Anzalone"), as follows:¹

With regard to ALJ Anzalone's factual findings:

1. ALJ Anzalone's finding that Respondent was *required* to pay a substantial surcharge on its base contribution rate. (ALJD 3:26-27).
2. ALJ Anzalone's failure to find that Respondent's payments to the pension fund were illegal and made in error without legal consultation. (ALJD 3:24:29).
3. ALJ Anzalone's failure to find that Bobby Sanders' motivation in sending a letter to Jose Santana, in which he expressed his interest to negotiate a successor collective-bargaining agreement, was that he wanted an agreement "tailored to suit [the needs of] a small business." (ALJD 3:44-4:2).
4. ALJ Anzalone's credibility determination regarding Jose Santana's statement about the 2015-2018 collective-bargaining agreement: "[a]ccording to Santana, he did direct Local 1176's administrative assistant to prepare a 2015-2018 collective-bargaining agreement for Delta in late March."²
5. ALJ Anzalone's failure to find that Respondent's note from April 2016 regarding the surcharge amount was not an express indication that it wanted to bargain with the Union over its pension contribution rate. (ALJD 5:29-35).
6. ALJ Anzalone's failure to find that Robert Sanders, Jr's testimony that "[Bobby Sanders] was concerned about rising labor costs" does not indicate an agreement had not been reached on the new collective-bargaining agreement. (ALJD 5:47-48).

With regard to ALJ Anzalone's finding that by unilaterally failing to make pension contributions for certain unit employees from March 2016 to the present, Respondent violated Sections 8(a)(1) and (5) of the Act (ALJD 11:9-11):

1. ALJ Anzalone's finding that Respondent discontinued its surcharge contributions to the fund *without* giving the Union notice and the opportunity to bargain. (ALJD 9:19-25).
2. ALJ Anzalone's rejection of Respondent's defense that its remittance of surcharge contributions to the Pacific Coast Shipyard Pension Fund (the "Pension Fund") would violate Section 302 of the Labor Management Reporting and Disclosure Act of 1959 ("Section 302"). (ALJD 9:22-25).
3. ALJ Anzalone's finding that Respondent violated the Act by discontinuing its surcharge contributions to the Pension Fund. (ALJD 9:24-25).

¹ References to ALJ Anzalone's decision will be referred to as "ALJD ____."

² ALJ Anzalone's credibility determination with respect to this statement is unclear in her decision. To the extent she found this statement to be credible, Delta takes exception.

4. ALJ Anzalone's finding that "in the absence of a contrary agreement or other applicable exception, an employer violates Section 8(a)(5) by failing to continue making such contributions after the contract expires" and reliance on *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986); *Concourse Nursing Home*, 328 NLRB 692, 702 (1999); *N.D. Peters & Co.*, 321 NLRB 35 927, 928 (1996); and *Local 777, Democratic Union Organizing Committee (Yellow Cab) v. NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1978). (ALJD 9:29-37).
5. ALJ Anzalone's finding that Respondent violated Section 8(a)(5) by unilaterally ceasing its surcharge pension contributions. (ALJD 10:16).
6. ALJ Anzalone's finding that Respondent was obligated to make appropriate surplus contributions to make up for any unfunded liability. (ALJD 10:18-21).
7. ALJ Anzalone's finding that "[t]he record evidence establishes that the Expired Contract both requires Respondent to make contributions to the Fund, as well as to make appropriate surplus contributions to make up for any unfunded liability." (ALJD 10:18-20).
8. ALJ Anzalone's finding that "Respondent's alleged concern over Section 302 does not excuse its failure to bargain." (ALJD 10:25-26).
9. ALJ Anzalone's finding that Respondent was not placed in a position of being required to comply with two conflicting statutory mandates. (ALJD 10:30-35).
10. ALJ Anzalone's finding that Respondent did not provide the union with notice and an opportunity to bargain over the pension surcharge payments. (ALJD 10:32-34).
11. ALJ Anzalone's finding that *Quality House of Graphics, Inc. (Local One-L, Graphic Comm. Int'l Union)*, 336 NLRB 497, 498-499 (2001) requires an employer to bargain in good faith with a union before discontinuing surcharge contribution payments even though such payments may violate Section 302(c)(5). (ALJD 10:34-41).
12. ALJ Anzalone's finding that "even assuming that making its full pension contribution would present Respondent with a form of 'exigent circumstances' recognized by the Board, this would not excuse its failure to provide the Union with notice and opportunity to bargain over such circumstance." (ALJD 10:48-11:6).

With regard to ALJ Anzalone's "Conclusions of Law" (ALJD 11:7-19):

1. ALJ Anzalone's conclusion that "[b]y unilaterally failing to make pension contributions for certain unit employees from March 2016 to present, Respondent unlawfully refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act." (ALJD 11:9-11).

With regard to ALJ Anzalone's "Remedy" (ALJD 11:20-36):

1. ALJ Anzalone's issued remedy that Respondent "should be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act." (ALJD 11:22-23)

2. ALJ Anzalone's issued remedy that Respondent "make whole its unit employees by making all such delinquent contributions on behalf of eligible employees that have not been made since those dates, including any additional amounts due the Fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 n. 7 (1979).
3. ALJ Anzalone's issued remedy that "Respondent, on request of the Union, [] restore the status quo ante that existed prior to April 2016 by continuing to make timely contributions to the [Pension Fund] on behalf of all eligible unit employees unless and until such time as it bargains with the Union in good faith to a contrary agreement or bona fide impasse." (ALJD 11:29-32).
4. ALJ Anzalone's issued remedy that "Respondent [] post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010). (ALJD 11:33-34).

With regard to the ALJ's Order (ALJD 12:3-48):

1. ALJ Anzalone's order that Respondent cease and desist from "[f]ailing and refusing to timely make required contributions to the [Pension Fund] without bargaining with the Union in good faith to an agreement or bona fide impasse, on behalf of employees in the following unit:

All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by Respondent and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in 25 Case 20-RC-2157."

(ALJD 12:9-25).

2. ALJ Anzalone's order that Respondent cease and desist from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act." (ALJD 12:26-27).
3. ALJ Anzalone's order that Respondent "make all delinquent pension contributions on behalf of unit employees that have not been made since April 2016, including any additional amounts due the Fund (sic), as set forth in the remedy section of this decision." (ALJD 12:32-34).

4. ALJ Anzalone's order that Respondent "make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest, as set forth in the remedy section of this decision." (ALJD 12:36-37).
5. ALJ Anzalone's order that Respondent "continue making required contributions to the Fund on behalf of eligible unit employees unless and until it has bargained in good faith to a new agreement or bona fide impasse." (ALJD 12:39-41).
6. ALJ Anzalone's order that Respondent "preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of pension contributions due under the terms of this Order." (ALJD 12:43-48).
7. ALJ Anzalone's order that Respondent "[w]ithin 14 days after service by the Region, post copies of the attached notice marked 'Appendix' at its facilities in Petaluma, California and Alameda, California. Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or has closed or ceased doing business at a facility covered by this order, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at those facilities at any time since April 22, 2015." (ALJD 13:2-15).
8. ALJ Anzalone's order that Respondent "[w]ithin 21 days after service by the Region file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply." (ALJD 13:17-20).

Dated: November 7, 2017

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DELTA SANDBLASTING COMPANY, INC.